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Nos. ~~895-905~~ 23-33

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In the Supreme Court of the United States

OCTOBER TERM, 1944

HEBER KIMBALL CLEVELAND, PETITIONER

v.

THE UNITED STATES OF AMERICA

HEBER KIMBALL CLEVELAND, PETITIONER

v.

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HEBER KIMBALL CLEVELAND, PETITIONER

v.

THE UNITED STATES OF AMERICA

DAVID BRIGHAM DARGER, PETITIONER

v.

THE UNITED STATES OF AMERICA

VERGIL Y. JESSOP, PETITIONER

v.

THE UNITED STATES OF AMERICA

THERAL RAY DOCKSTADER, PETITIONER

v.

THE UNITED STATES OF AMERICA

L. R. STUBBS, PETITIONER

v.

THE UNITED STATES OF AMERICA

FOLLIS GARDNER PETTY, PETITIONER

v.

THE UNITED STATES OF AMERICA

WILLIAM CHATWIN, PETITIONER

v.

THE UNITED STATES OF AMERICA

CHARLES F. ZITTING, PETITIONER

v.

THE UNITED STATES OF AMERICA

EDNA CHRISTENSEN, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the circuit court of appeals (R. 139–147) has not yet been reported. The opinion

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[1] Together with No. 896, *Heber Kimball Cleveland, Petitioner* v. *The United States of America;* No. 897, *Heber Kimball Cleveland, Petitioner* v. *The United States of America;* No. 898, *David Brigham Darger, Petitioner* v. *The United States of America;* No. 899, *Vergel Y. Jessop, Petitioner* v. *The United States of America;* No. 900, *Theral Ray Dockstader, Petitioner* v. *The United States of America;* No. 901, *L. R. Stubbs, Petitioner* v. *The United States of America;* No. 902, *Follis Gardner Petty, Petitioner* v. *The United States of America;* No. 903, *William Chatwin, Petitioner* v. *The United States of America;* No. 904, *Charles F. Zitting, Petitioner* v. *The United States of America;* and No. 905, *Edna Christensen, Petitioner* v. *The United States of America.*

of the district court (R. 15–27) is reported at 56 F. Supp. 890.

JURISDICTION

The judgments of the circuit court of appeals were entered January 4, 1945 (R. 147–153). The petition for writs of certiorari was filed January 30, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether a religious belief in polygamy bars prosecutions under the Mann and Federal Kidnaping Acts.

2. Whether, if religious considerations did not preclude the prosecutions, the facts stipulated established violations of the Mann and Kidnaping Acts.

STATUTES INVOLVED

Section 2 of the Act of June 25, 1910, c. 395, 36 Stat. 825 (18 U. S. C. 398), known as the Mann Act, provides in part:

> SEC. 2. That any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, * * * any woman or girl for the purpose of prostitution or

debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; * * * shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court.

The Federal Kidnaping Act of June 22, 1932, c. 271, 47 Stat. 326, as amended by the Act of May 18, 1934, c. 301, 48 Stat. 781 (18 U. S. C. 408a), provides in pertinent part as follows:

SEC. 1. Whoever shall knowingly transport or cause to be transported, or aid or abet in transporting, in interstate or foreign commerce, any person who shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away by any means whatsoever and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall, upon conviction, be punished (1) by death if the verdict of the jury shall so recommend, provided that the sentence of death shall not be imposed by the court if, prior to its imposition, the kidnaped person has been liberated unharmed, or (2) if the death penalty shall not apply nor be imposed the convicted person shall be punished by imprisonment in the penitentiary

for such term of years as the court in its discretion shall determine: * * *

STATEMENT

Seven indictments charging violations of the Mann Act and one charging a violation of the Kidnaping Act were returned in the United States District Court for the District of Utah. The Mann Act indictments (Cases 895–902) charged the petitioners named therein with having transported certain women in interstate commerce for the immoral purpose of having them act as mistresses or concubines (R. 1, 47, 55, 56, 65, 85, 113, 127). The Kidnaping Act indictment (Cases 903–905) charged that petitioners Chatwin, Zitting, and Christensen unlawfully inveigled, decoyed, carried away, and held a minor child, age 15, for a certain period, and knowing her to have been so inveigled, held, etc., transported her from Utah by way of El Paso, Texas, to Arizona (R. 95–96). Each of the defendants waived a jury trial and consented to a trial of his case by the court on a stipulation of facts entered into by his counsel (R. 7, 13, 48, 57, 66–67, 86–87, 96–97, 114, 115, 128–129). The facts so stipulated may be summarized as follows:

Each of the petitioners was a member of the Fundamentalist sect which sanctioned plural, or, as they call it, "celestial"[2] marriages, and which

[2] A "celestial" marriage is a "religious ceremony according to the beliefs of [the] Fundamentalists, * * * but contrary to" state laws (R. 8).

petitioners claimed followed the original doctrines and practices of the Mormon Church (R. 8, 12, 67, 87, 98, 99, 117–118, 130). In each of the Mann Act cases except the second indictment against petitioner Cleveland (Case 896), the woman named in the indictment as the person transported had previously participated in a "celestial" marriage ceremony with a petitioner who already had a legal wife living, and the transportation which formed the basis of the indictment in each such instance was with the intent of continuing sexual relations with such "celestial" wife (R. 8–9, 11–12, 67–68, 87–88, 116–118, 129–131).[3] The transportation which formed the basis of the second indictment against Cleveland was for the purpose of having a "celestial" marriage performed, after which petitioner and the woman named in the indictment engaged in sexual intercourse (R. 10).

On the kidnaping indictment, the stipulated facts were that petitioner Chatwin, a widower then 68 years of age, employed as a housekeeper a girl 14 years old with the mentality of a seven year old child. He persuaded her to enter into a "celestial" marriage with him, and she subsequently became pregnant. When her parents discovered her condition they informed the juvenile authorities of the State of Utah, who took her

[3] In respect of petitioners Stubbs and Dockstader, who were jointly indicted (R. 113–114), the proof was that Stubbs transported Dockstader's "celestial" wife to Dockstader's house at his request knowing that Dockstader intended to live with her in plural marriage (R. 116–117).

into custody and caused her to be made a ward of the juvenile court. The girl eluded the authorities and went to the home of petitioners Zitting and Christensen who, together with Chatwin, convinced her that, as they put it, she should "abide by the law of God rather than the law of man" and that she was justified in running away in order to live with Chatwin. They further convinced her she ought to go to Mexico to be married to Chatwin and then remain in hiding until she reached her majority under Utah law. The three petitioners then transported the girl to Mexico by way of El Paso, Texas. She underwent a civil marriage ceremony with Chatwin in Mexico, giving her age as 18 years, and she was subsequently brought back to Arizona where she remained in hiding and lived with Chatwin under an assumed name as husband and wife until discovered by the federal authorities two years later. (R. 97–100.)

The trial judge found all the petitioners guilty as charged (R. 28, 49, 58, 77, 89–90, 102, 119, 132–133). Petitioner Cleveland, who is the defendant named in the first three indictments (Cases 895, 896 and 897), was sentenced to three years' imprisonment on each of the first two, the sentences to run concurrently, and to imprisonment for one year and one day on each of three counts of the third indictment, the sentences on this indictment to run concurrently with each other, but consecutively to the sentences imposed on the other indictments (R. 29, 50–51, 59). The other petitioners

convicted of Mann Act violations were each sentenced to three years' imprisonment (R. 78, 90, 119–120, 133). On the kidnaping charge petitioners Chatwin and Zitting were each sentenced to imprisonment for two years and petitioner Christensen to imprisonment for one year and one day (R. 102–103). On appeal, all the convictions were affirmed (R. 139–153).

ARGUMENT

1. Petitioners contend, as we understand them, that the Mann and Kidnaping Acts cannot constitutionally be applied to their acts because they were committed in the exercise of a sincere religious belief in polygamy; that their convictions cannot be upheld without improper judicial inquiry into the verity of their religious beliefs; that the Federal Government is without power to regulate marriage; that their religious beliefs prevented the transportations from being motivated by an immoral purpose within the meaning of the Mann Act and presumably, also, removed the transportation involved in the kidnaping charge from the ambit of the Kidnaping Act because the holding of the girl involved was not for an improper purpose (Pet. 3, 5–7, 8, 16–17, 19–22).

The decisions of this Court foreclose petitioners' arguments. In cases involving the early Mormons, who, on religious grounds, entertained views on polygamy identical with those of petitioners, it was held that the guarantee of religious freedom does

not protect from punishment acts, as distinguished from beliefs, violative of a general criminal statute enacted for the protection of the morals and welfare of the community. *Davis* v. *Beason*, 133 U. S. 333; *Reynolds* v. *United States*, 98 U. S. 145, 166; see also *Mormon Church* v. *United States*, 136 U. S. 1, 50; *Baxley* v. *United States*, 134 F. 2d 937 (C. C. A. 4). Where, as here, the violator knowingly performs the criminal acts, he cannot use his religious belief to negate criminal intent. *Reynolds* v. *United States, supra*, at 167. The application of laws such as those here involved to religious polygamists cannot be regarded as a federal regulation of marriage; so far as they conflict with such relationships their impingement results only because those relationships are against the laws and mores of this country. *Davis* v. *Beason, supra; Reynolds* v. *United States, supra*. The transportation of a woman for the purpose of living with her as a mistress or concubine is transportation for an immoral purpose within the meaning of the Mann Act. "To say the contrary would shock the common understanding of what constitutes an immoral purpose when those terms are applied, as here, to sexual relations." *Caminetti* v. *United States*, 242 U. S. 470, 486. By the same token, to hold a girl for the purpose of fostering such a relationship is to hold her for the purpose of obtaining a privilege to which the kidnaper is not entitled and

therefore constitutes a holding within the meaning of the kidnaping statute. Cf. *Gooch* v. *United States*, 297 U. S. 124, 128.[4]

2. Aside from the religious motive, petitioners appear also to make the following contentions:

(a) Relying upon the decision of this Court in *Mortensen* v. *United States*, 322 U. S. 369, petitioners seem to argue that since, in each of the Mann Act cases, except the second indictment against petitioner Cleveland, which involved transportation for the purpose of entering into a "celestial marriage" relationship (see p. 5, *supra*), the evidence establishes that the woman transported was already the "celestial" wife of the petitioner, the transportation was not motivated by a purpose condemned by the Act. However, in each such instance, the stipulated facts show that the transportation was in fact for the purpose of enabling the petitioner to continue cohabitation with his

[4] Petitioners also assert (Pet. 7, 17), without supporting argument, that the Treaty of Guadalupe Hidalgo between the United States and Mexico at the close of the Mexican War bars their prosecution for acts performed in accordance with their religious beliefs. As appears from the opinion of the district court (R. 25), they apparently contend that, since Mormons had settled in the part of this country which was ceded by Mexico, they are protected by Article IX of the treaty. Obviously, they do not come within the terms of the treaty. It provided (Pet. 14) that Mexicans who did not preserve their Mexican citizenship should be incorporated into the Union and admitted at the proper time to the enjoyment of all rights of citizens of the United States, and "in the meantime" should be protected in the free exercise of their religion without restriction.

"celestial" wife. Thus, the transportation which formed the basis of the first indictment against Cleveland was a "honeymoon trip" following a "celestial" marriage (R. 1–2, 9–10), and the three counts of his third indictment were based on separate trips from Utah to Colorado for the specific purpose of taking "celestial" wives to his residence in Colorado to cohabit with him (R. 11–12, 55–56). Darger's conviction was based upon his transportation of one of his "celestial" wives from Colorado, where he had been working, to Utah, where he lived with her and his other wives (R. 65–66, 67–68). Jessop and Dockstader each maintained separate homes in different states for their legal and "celestial" wives, and the prosecution of each was based upon transportation of the "celestial" wife to the home maintained for his legal wife for the purpose of having sexual relations with the "celestial" wife (R. 85–86, 87–88, 113–114, 116–118).[5] In Petty's case, his "celestial" wife had left Utah, where she had been living with him, to visit relatives and then went to her mother's home in Idaho, where Petty also maintained a residence with his legal wife. Petty then transported his "celestial" wife back to their residence in Utah with the intent to resume their relationship, but on their arrival she refused further to cohabit with

[5] Petitioner Stubbs performed the act of transporting Dockstader's "celestial" wife (R. 117; see also footnote 3, p. 5, *supra*).

him (R. 127–128, 129–131). In each instance, therefore, the primary motive for the transportation was the continuance or resumption of sexual relations with the "celestial wife. The principle of the *Mortensen* decision is consequently inapplicable.

(b) The petitioners convicted under the Kidnaping Act (Cases 903–905) appear to question the sufficiency of the stipulated facts to establish a violation of that statute (Pet. 7–8). The facts upon which these convictions were based are set forth at pp. 5–6, *supra*. There can be no doubt, as held by the circuit court of appeals (R. 145–146), that the transportation in interstate commerce of a child who had been inveigled and persuaded to hide herself from the Utah juvenile authorities so that petitioner Chatwin might continue to cohabit with her pursuant to the illicit relationship which had arisen because of their "celestial" marriage, brought the case within the purview of the kidnaping statute. The "holding" need only be "something done with the expectation of benefit to the transgressor." *Gooch* v. *United States*, 297 U. S. 124, 128; *Miller* v. *United States*, 138 F. 2d 258 (C. C. A. 8), certiorari denied, 320 U. S. 803.*

* The indictment in the kidnaping case (R. 95–96) fails to specify the purpose of the holding. In their motion to quash, petitioners attacked the indictment generally as failing to state an offense (R. 101) but apparently did not attempt to attack its sufficiency as a pleading either in the district court or in the circuit court of appeals and do not attack it here.

CONCLUSION

The petition for writs of certiorari presents no question requiring review by this Court, and we therefore respectfully submit that it should be denied.

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From their stipulation of facts, it is evident that petitioners were aware of the charge against them and the stipulation of facts, as we have shown, established an offense under the statute. Under such circumstances the indictment, if defective, was, we believe, cured by the verdict. See *Knight* v. *United States*, 137 F. 2d 940 (C. C. A. 8), where a kidnaping indictment in substantially the same form as that here involved was upheld against a motion to vacate the judgment of conviction. Cf. *Hagner* v. *United States*, 285 U. S. 427, 433.

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